

# **DRAFT**

## **JOINT FEDERAL/STATE PROCEDURES FOR THE ESTABLISHMENT AND OPERATION OF WETLAND MITIGATION BANKS IN THE U.S. ARMY CORPS OF ENGINEERS MOBILE DISTRICT**

Guidance Process Developed by the Following Agencies on the Mitigation  
Bank Review Team

U.S. Army Corps of Engineers – Mobile District  
U.S. Environmental Protection Agency – Region IV  
U.S. Fish and Wildlife Service – Daphne, Alabama  
U.S. Fish and Wildlife Service – Jackson, Mississippi  
Mississippi Department of Marine Resources  
Alabama Department of Environmental Management  
Mississippi Department of Environmental Quality

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**FUNDAMENTAL REQUIREMENTS OF MITIGATION BANKS  
IN THE STATES OF ALABAMA AND MISSISSIPPI  
(MOBILE CORPS DISTRICT)**

The following are the minimum requirements that will be used by the Mitigation Bank Review Team (MBRT) during their initial evaluation of all mitigation bank proposals. It is important for prospective bankers to take note that mitigation bank proposals failing to meet any one, or more, of the following requirements are not likely to receive federal or state authorization as a mitigation bank.

Pursuant to the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, the applicant must provide reasonable assurance that the proposed mitigation bank:

1. Will improve ecological conditions of the regional watershed(s);
2. Will provide viable and sustainable ecological and hydrological functions for the proposed mitigation service area;
3. Will be effectively managed in perpetuity;
4. Will not destroy areas with high ecological value;
5. Will achieve mitigation success;
6. Will be adjacent to lands that are not anticipated to adversely affect the perpetual viability of the mitigation bank due to unsuitable land uses or conditions;
7. Will meet the requirement of all other applicable state or federal law;
8. Applicant has sufficient legal or equitable interest in the property to ensure perpetual protection and management of the land within a mitigation bank; and,
9. Can meet the financial responsibility requirements prescribed for mitigation banks.

It should be noted that the **Alabama / Mississippi MBRT** discourages the establishment of a mitigation bank based solely on exotic plant removal. This is due primarily to the inability of a bank of this type to adequately compensate for the loss of a suite of wetland functions that normally occurs at an impact site.

## **STATE/FEDERAL MITIGATION BANK REVIEW TEAM PROCESS FOR ALABAMA AND MISSISSIPPI (MOBILE CORPS DISTRICT)**

This section describes the joint State/Federal process for the evaluation of wetland mitigation banks in **Alabama and Mississippi**. This process was developed cooperatively by the following agencies: (**See Appendix A for contact telephone numbers and addresses**).

- U.S. Army Corps of Engineers, Mobile District (Corps)
- National Marine Fisheries Service (NMFS)
- U.S. Fish and Wildlife Service (FWS)
- Environmental Protection Agency (EPA)
- Department of Conservation and Natural Resources (DCNR)
- Alabama Department of Environmental Management (ADEM)
- Mississippi Department of Marine Resources (DMR)
- Mississippi Department of Environmental Quality (DEQ)

**Background:** In November 1995, the Corps, NRCS, EPA, FWS, and NMFS jointly issued Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (herein referred to as the “Federal Guidance”). A key point of the Federal Guidance (**See Appendix B**) is that an interagency Mitigation Bank Review Team (MBRT) should evaluate proposed mitigation banks. Federal recognition of mitigation bank is through a Mitigation Banking Instrument (MBI) signed by the federal and state MBRT members and the Banker. A mitigation bank in Alabama or Mississippi must have an approved MBI. The goal of the MBRT is to obtain consensus on issues related to the establishment, use, and operation of the banks under review. The State/Federal interagency team developed the MBRT process for Alabama and Mississippi in order to streamline the respective evaluation processes and reduce redundancy between the State and Federal review.

**Applicability:** The MBRT process is a Federal requirement for the evaluation of mitigation banks. The process described herein is based on the procedures described in the Federal Guidance. The MBRT process is a true joint State/Federal coordinated pre-application phase. The interagency team believes it is to the advantage of all parties to participate in the MBRT process because it provides a mechanism for maximum interagency coordination with minimum logistical complexity. It is anticipated that this will contribute to quick and consistent agency determinations in a cost-effective manner.

**Agency Roles:** At the Federal level, the Corps will serve as the MBRT Chair, except in cases where the bank is proposed solely for the purpose of complying with the Food Security Act (i.e., “Swampbuster” provisions), in which case the NRCS will serve as Chair.

**Logistics:** The MBRT Forum will meet every other month, the actual date to be determined based upon MBRT scheduling.

Due to the overlapping geographic responsibilities of the involved agencies, locations of the regional MBRT meetings will be dependent upon the number of mitigation banks from each state wishing to present. It is usually on a rotational basis between the Federal Chair and the State of Mississippi. Meeting dates will be scheduled in advance with the MBRT Chair responsible for distribution of the meeting agenda. The MBRT forums should be the primary vehicles for the evaluation of all phases of mitigation bank development (e.g., pre-application presentations, pending application discussions, post-approval issues). The agencies will strive to accomplish all important interactions with bankers in the MBRT forums in order to maximize interagency coordination.

**Interagency Policy Coordination:** The joint MBRT process is designed to evaluate the technical aspects of mitigation banking through a team approach. Experience to date has shown that during the technical evaluation of some mitigation banking proposals, policy issues were raised that needed close coordination of policy level decision makers of the respective agencies. Mitigation banks can often be related to public projects already planned or in place. These proposals usually need the input of agency specialists directly involved in the public project to determine if the proposed bank will be compatible. An interagency policy coordination procedure (**see Appendix E**) has been developed for the early identification of such proposals. All mitigation bank proposals should be run through the policy coordination procedure. Projects that are identified as needing special attention should not be reviewed by the MBRT for technical sufficiency until the identified issues are resolved.

## STATE/FEDERAL MITIGATION BANK REVIEW TEAM PROCESS: REVIEW FLOWCHART

**DMBI = Draft Mitigation Banking Instrument**

**MBI = Mitigation Bank Instrument**

**MBRT = Mitigation Bank Review Team**

**MSA = Mitigation Service Area**

**PACP = Pre-Application Coordination Phase**

**RAI = Request for Additional Information**

### **A. FIRST CONTACT**

A1. Banker's initial inquiry forwarded to MBRT Chair.

- Chair adds project to MBRT forum agenda and notifies applicant of pre-application information requirements (**See Appendix C**).
- Chair sends banker guidance package on State/Federal MBRT process and copies MBRT members. **The Corps is currently developing a sample Conservation Easement and Restrictive Covenant that will be attached to this document once approved.**

A2. Banker's submittal of pre-application prospectus to begin the Pre-Application Coordination Phase (**See Appendix C**).

- **Banker sends information on pre-application checklist and prospectus to MBRT members at least 14 days prior to MBRT Forum.**
- Go to B – MBRT Forum.

### **B. MBRT FORUM**

- Banker presents project and receives informal MBRT feedback. Provided that a complete prospectus was submitted in advance, MBRT members should be prepared to take a position on:
  - Bank site is/is not appropriate.
  - Long-term sustainability of the bank is/is not feasible.
  - Mitigation plan is/is not appropriate/feasible.
  - Banker's proposed method to assess functional lift is/is not acceptable (ratio, WRAP, HGM - actual scoring later in process).
  - Basis for Mitigation Service Area limits is/is not appropriate (may fine tune map later).
  - Chair captures preliminary MBRT decisions in memo to all participants within 7 days.

B1. CONSENSUS – Bank concept is INAPPROPRIATE.

- *Go to C – Agency Written Comments/Recommendations.*

B2. NO CONSENSUS.

- *Go to C – Agency Written Comments/Recommendations.*

B3. CONSENSUS – Bank concept is APPROPRIATE.

(NOTE: A site visit may be needed before MBRT members are able to address these issues.)

**C. WRITTEN COMMENTS:** Within 30 days MBRT members provide written comments to MBRT Chair, which indicate their agency recommendation(s). Non-consensus letters should specify issues and suggest remedies.

C1. CONSENSUS – Bank concept is INAPPROPRIATE.

- *Go to F – Bank Concept Inappropriate*

C2. NO CONSENSUS.

- *Go to D - Rebuttal / Revisions Submitted.*

**D. BANKER REBUTTAL / REVISIONS SUBMITTED.**

- At least 14 days prior to a future MBRT forum, Banker may submit rebuttal or revisions to MBRT members.
- *Go to E – MBRT Forum.*

**E. MBRT FORUM**

- Banker may present rebuttal.
- MBRT attempts to reach consensus.
- Chair captures final MBRT decisions in memo to all participants.

E1. CONSENSUS – Bank concept is INAPPROPRIATE.

- *Go to F – Bank Concept Inappropriate.*

E2. CONSENSUS – Bank concept is APPROPRIATE.

- *Go to H – Bank Concept Approved.*

E3. NO CONSENSUS.

- *Go to G – Dispute Resolution Procedure.*

**F. BANK CONCEPT INAPPROPRIATE** - MBRT Chair notifies Banker and recommends remedies for consensus. Banker may submit revised prospectus for reconsideration by MBRT if project can be modified to address agency issues.

- *Go to B – MBRT Forum*

**G. DISPUTE RESOLUTION PROCEDURE** per federal guidance paragraph IIC.6.a (District Engineer makes final determination.)

G1. Bank concept is INAPPROPRIATE.

- *Go to F – Bank Concept Inappropriate.*

G2. Bank concept is APPROPRIATE. Banker recognizes that fully-executed Banking Instrument for current version of the proposal is unlikely.

- *Go to H – Bank Concept Approved.*

H. **BANK CONCEPT APPROVED.** PACP is now complete.

- Banker begins preparation of DMBI and submits proposed Conservation Agreement and Stewardship Agreement for MBRT review by Legal Counsels.
- Schedule site visit.
- Go to I – MBRT Site Inspection.

I. **MBRT SITE INSPECTION**

- Wetlands delineation verified by the Corps of Engineers.
- Using the agreed upon functional assessment method, MBRT confirm the proposed ecological lift between the without-bank and with-bank scenarios.
- MBRT provides additional informal feedback to Banker to aid in preparation of the final spreadsheet on available credits - use information for the DMBI.
- *Go to J – MBRT Input.*

J. **MBRT INPUT**

- Banker submits DMBI (**SEE BANKING INSTRUMENT OUTLINE**) to MBRT members.

J1. DMBI is INCOMPLETE.

- *Go to K – Completeness Loop.*

J2. DMBI is COMPLETE.

- *Go to L – Public Notice.*

K. **COMPLETENESS LOOP**

- MBRT agencies request additional information within 30 days.
- All MBRT members will strive to coordinate completeness concerns with MBRT Chair.
- MBRT Agencies will combine concerns for a joint Request for Additional Information.
- Request the Banker provide additional information.

K1. DMBI is INCOMPLETE.

- *Repeat K (Completeness Loop)*

K2. COMPLETE DMBI is received.

- *Go to L – Public Notice.*

L. **PUBLIC NOTICE:** Within 15 days of receipt of complete DMBI, the MBRT Chair issues a Department of the Army Public Notice with 30-day comment period.

L1. No substantive public or MBRT member objections = DMBI accepted.

- *Go to P – MBI Signature.*



- L2. Substantive public objection or MBRT member objection received.
- Within 15 days of close of comment period, MBRT Chair formally coordinates Public Notice and/or DMBI comments with Banker and recommends remedies.
  - At least 14 days prior to MBRT Forum, Banker submits formal response to Chair with copies to all MBRT members.
  - *Go to M – MBRT Forum.*

**M. MBRT FORUM**

- Banker may present rebuttal.
- MBRT attempts to reach consensus.
- Chair captures MBRT decisions in memo to all participants.

M1. CONSENSUS – BANK is INAPPROPRIATE.

- *Go to N – Final Action by MBRT Chair.*

M2. NO CONSENSUS.

- *Go to O – Dispute Resolution Procedure.*

M3. CONSENSUS - BANK is APPROPRIATE.

- Banker revises DMBI to meet with MBRT consensus.
- *Go to P – MBI Signature.*

**N. BANK is INAPPROPRIATE per consensus of MBRT.**

- The MBRT Chair will take final action on the application.

**O. DISPUTE RESOLUTION PROCEDURE** per federal guidance paragraph IIC.6.a (District Engineer makes final determination.)

O1. Bank concept is INAPPROPRIATE.

- *Go to N – MBRT Chair takes final action.*

O2. MBRT CONSENSUS CANNOT BE REACHED.

- Banker realizes that fully executed MBI is unlikely and 404(q) elevation of the permit application is possible.
- *Go to P – MBI Signature.*

**P. FINAL MBI CIRCULATED FOR SIGNATURE.**

# **BANKING INSTRUMENT OUTLINE**

## **COVER PAGE**

- Purpose of the document.
- Title of document and official name of bank.
- List of signatories.
- Effective date.

## **I. PREAMBLE**

- Purpose of bank and its relationship to Corps (or NRCS) and state regulatory programs.
- Project description (Bank size and classes of wetlands and/or other aquatic resources).
- Location and size of bank, ownership, and identity of bank sponsor.
- Baseline conditions.
- Establishment and use of credits.
- Type of bank (e.g. single client, general use, joint-project proprietary); identity of sponsor.
- Makeup, role, and responsibility of the MBRT.
- List of exhibits (appendices), including all appropriate supporting technical plans and documents.

## **II. ESTABLISHMENT OF THE BANK**

- Mitigation Plan (Description of work to be done).
- Implementation timetable.
- Type of real estate interest to be secured by the sponsor.
- Financial assurances to be secured by the sponsor:
  - Contingency funds\* are to be secured by a Letter of Credit
  - Long-term stewardship funds\*
    - \* *Provide (1) Details on type of funding, and (2) Justification for level of proposed funding*
- As-built reports.

## **III. OPERATION OF THE BANK**

- Service area.
- Types of projects or activities that may use the bank.
- Assessment methodology.
- Success criteria.
- Procedures for release of financial assurance.
- Provisions for site audits by MBRT.
- Conditions on debiting.
- Adding an additional tract.

### III. OPERATION OF THE BANK (continued)

- Schedule of credit availability. [See example below.]

<b>Sample Schedule of Credit Availability</b> <i>(Actual percentages to be determined on a case-by-case basis.)</i>	
<b>Execution of conservation easement .....</b>	<b>20%</b>
<b>Completion of earth moving/ Construction/hydrologic manipulation .....</b>	<b>20%</b>
<b>Incremental based on success criteria* .....</b>	<b>40%</b>
<b>Achievement of final success criteria* .....</b>	<b>20%</b>
<b>* as determined by the MBRT</b>	

### IV. PROVISIONS COVERING USE OF THE LAND

- Incompatible activities
- Transfer of ownership of the bank lands and/or easements.
- Conservation Easement.
- Stewardship Agreement.

### V. LONG-TERM MANAGEMENT RESPONSIBILITIES

- Long-term maintenance plan that is to include method for funding long-term maintenance of the bank.
- Long-term responsible party

## **SERVICE AREAS FOR MITIGATION BANKS IN ALABAMA AND MISSISSIPPI (MOBILE CORPS DISTRICT)**

**Federal Guidance:** The Federal Guidance regarding wetland mitigation banks specifically addresses the topic of service areas. The Federal Guidance indicates that the service area boundary should be defined according to hydrological and ecological functions. Additionally, the Federal Guidance encourages flexibility as long as that flexibility is scientifically based. The Federal Guidance also suggests a combination of using hydrologic cataloging units that have been mapped by the United States Geologic Survey (USGS) and “Ecoregions of the United States”, by either James M. Omernik or Robert G. Bailey, as a guide. The Federal Guidance permits the option of using other classification systems developed at a state or regional level.

**HUCs and Ecoregions:** In Alabama and Mississippi, watersheds have been mapped using the 8-digit USGS Hydrologic Unit Code (HUC) (**See Appendix F**) and underlain with the 1995 USFS Ecoregions (**See Appendix G**). Actual service areas for banks will be clearly defined and mapped in mitigation banking instruments. The individual agency concurrence signature on the mitigation banking instrument will reflect the general acceptance of the service area.

**The mitigation service area (MSA) for a bank is based on the area within which adverse impacts could reasonably be expected to be offset by the mitigation bank.** The MBRT will determine the appropriate basin for the MSA. As suggested by the Federal Guidance, the MBRT will be flexible in determining the extent of the service area as long as it has a basis in natural science and is not based on economic considerations or political boundaries. Within the MSA, the Proximity Factor described in **Appendix I** will apply. As the methods of defining service areas for mitigation banks in Alabama and Mississippi are further refined, they will be considered by the MBRT throughout the states and applied as appropriate.

**Use of bank outside of designated service area:** Use of a mitigation bank to compensate for impacts beyond the designated service area may be authorized on a case-by-case basis. The MBRT believes exceptional circumstances are required to mitigate for impacts outside of the service area. An out-of-basin multiplier in addition to the proximity factor will apply in the event a bank is approved to compensate for impacts beyond its designated service area (**See Appendix I**). In addition, other State and Federal permitting criteria may limit the use of a mitigation bank, even within the designated service area.

**In-kind versus out-of-kind mitigation determinations:** In the interest of achieving functional replacement, in-kind compensation of aquatic resource impacts should generally be required. Out-of-kind compensation may be acceptable if it is determined to be environmentally preferable to in-kind compensation (e.g., of greater ecological value to a particular region). Out-of-kind compensation may be acceptable if it offsets functions provided by wetlands that are lost due to regulated activities. However, non-tidal wetland should typically not be used to compensate for the loss or degradation of

tidal wetlands. Decisions regarding out-of-kind mitigation are typically made on a case-by-case basis during the permit evaluation process. The mitigation banking instrument may identify circumstances in which it is environmentally desirable to allow out-of-kind compensation within the context of a particular mitigation bank (e.g., for banks restoring a complex of associated wetland types). Mitigation banks developed as part of an area-wide management plan to address a specific resource objective (e.g., restoration of a particularly vulnerable or valuable wetland habitat type) may be such an example. Out-of-kind compensation will be subject to a proximity factor.

## SUPPLEMENTAL GUIDANCE

**Conservation Requirements:** Pursuant to the Federal Banking Guidance, mitigation banks shall be protected in perpetuity through the use of conservation easements or via transfer of the title to Federal or State resource agencies or non-profit conservation organizations. If the lands are protected via conservation easements, the third party easement holder shall be identified prior to the approval of the Banking Instrument.

**Long-term Land Stewards for Mitigation Banks:** The long-term land stewards for a proposed mitigation bank must be approved by the MBRT and identified during the development of the Banking Instrument. Once identified, a letter will be required from the land steward confirming that it acknowledges and accepts this responsibility. This letter will become part of the Banking Instrument.

- Regarding acceptable long-term land stewards, the preference is for transfer of the title and long-term stewardship fund to a Federal or State resource agencies or 501 (C)(3) non-profit conservation organizations such as The Nature Conservancy, Wildlife Federation, or other private Land Trust's once all credits have been sold. The steward will be responsible for the site's long-term management and funds oversight.
- For bank sponsors wishing to retain property ownership, the sponsor must identify a third party to hold the site's conservation easement and create a long-term management team to oversee the site's long-term management and control use of the long-term stewardship fund. The long-term management team must contain a balance between private and conservation interests such as 501 (C)(3) organizations, federal, state, or local resource agencies.
- The MBRT agreed that designated long-term stewards for mitigation banks should be provided the opportunity to review and provide comments on the land management strategies and long-term funding amounts to ensure they comply with what is required to appropriately manage the banks after all credits have been sold.
- The MBRT believes that by identifying an appropriate long-term land steward during the development of the Banking Instrument, it can eliminate the uncertainty of who will actually accept and perform this responsibility, and the amount of funding needed, once all credits are sold.

**Performance Bonds/Financial Assurances for Mitigation Banks:** All new mitigation banks shall be required to provide a performance bond and demonstrate that long-term financial assurances are in place prior to finalization of a Banking Instrument. This information will be coordinated with the designated long-term steward(s) during the development of the Banking Instrument to ensure that acceptable management strategies can be maintained and that the proposed amount of long-term funding is adequate.

**Changes to Draft Mitigation Banking Instruments:** All changes to the text, figures, tables, etc of revised proposed banking instruments must:

- **Bold all changes** that were made to any of the banking instrument pages (so changes can be easily identified)
- Place the date of the revision on the instrument.

## **APPENDIX A: MBRT MAILING LIST**

### **U.S. Army Corps of Engineers, Mobile District Office, Regulatory, Post Office Box 2288, Mobile, Alabama 36628-0001**

Michael B. Moxey (E-mail) [Michael.B.Moxey@sam.usace.army.mil](mailto:Michael.B.Moxey@sam.usace.army.mil)  
Telephone: 251-694-43771 **(3 Copies)**

### **U.S. Environmental Protection Agency, Region 4, Water Management Division, 61 Forsyth Street SW, Atlanta, Georgia, 30303-8960**

Palmer Hough (E-mail) [Hough.Palmer@epa.gov](mailto:Hough.Palmer@epa.gov)  
Telephone: 404-562-9419

### **U.S. Fish and Wildlife Service – Post Office Drawer 1190, Daphne, Alabama, 36526**

Darren LeBlanc (E-mail) [Darren\\_LeBlanc@fws.gov](mailto:Darren_LeBlanc@fws.gov)  
Telephone: 251-441-5181 ext. 35

### **Alabama Department of Environmental Management , Coastal Programs Office, 2204 Perimeter Road, Mobile, Alabama 36615-1131**

Leslie Turney (E-mail) [let@adem.state.al.us](mailto:let@adem.state.al.us)  
Telephone: 251-432-6533

### **Alabama Department of Conservation and Natural Resources, State Lands Division, 64 North Union Street, Montgomery, Alabama 36130**

Garth Crow (E-mail) [gcrow@dcnr.state.al.us](mailto:gcrow@dcnr.state.al.us)  
Telephone: 251-353-9145

### **Mississippi Department of Environmental Quality, Office of Pollution Control, Post Office Box 10385, Jackson, Mississippi 39289-0385**

Shawn Clark (E-mail) [Shawn\\_Clark@deq.state.ms.us](mailto:Shawn_Clark@deq.state.ms.us)  
Telephone: 601-961-5629

### **Mississippi Department of Marine Resources, Coastal Ecology Division, 1141 Bayview Avenue, Suite 101, Biloxi, Mississippi 39531**

Paul Necaise (E-mail) [paul.necaise@dmr.state.ms.us](mailto:paul.necaise@dmr.state.ms.us)  
Cindy Henderson (E-mail) [cindy.Henderson@dmr.state.ms.us](mailto:cindy.Henderson@dmr.state.ms.us)  
Telephone: 228-374-5000 **(2 copies)**

### **U.S. Fish and Wildlife Service, 6578 Dogwood View Parkway, Jackson, Mississippi 39213**

Daniel Gregg (E-mail) [Daniel\\_Gregg@fws.gov](mailto:Daniel_Gregg@fws.gov)  
Telephone: 601-321-1136



## **APPENDIX B: 1995 FEDERAL BANKING GUIDANCE**

[Federal Register: November 28, 1995 (Volume 60, Number 228)]  
[Notices]  
[Page 58605-58614]  
From the Federal Register Online via GPO Access [wais.access.gpo.gov]  
[DOCID:fr28no95-49]

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DEPARTMENT OF DEFENSE

### Federal Guidance for the Establishment, Use and Operation of **Mitigation Banks**

AGENCIES: Corps of Engineers, Department of the Army, DOD;  
Environmental Protection Agency; Natural Resources Conservation  
Service, Agriculture; Fish and Wildlife Service, Interior; and National  
Marine Fisheries Service, National Oceanic and Atmospheric  
Administration, Commerce.

ACTION: Notice.  
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SUMMARY: The Army Corps of Engineers (Corps), Environmental Protection  
Agency (EPA), National Resources Conservation Service (NRCS), Fish and  
Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) are  
issuing final policy guidance regarding the establishment, use and  
operation of **mitigation banks** for the purpose of providing compensation  
for adverse impacts to wetlands and other aquatic resources. The  
purpose of this guidance is to clarify the manner in which **mitigation  
banks** may be used to satisfy **mitigation** requirements of the Clean Water  
Act (CWA) Section 404 permit program and the wetland conservation  
provisions of the Food Security Act (FSA) (i.e., ``Swampbuster''  
provisions). Recognizing the potential benefits **mitigation** banking  
offers for streamlining the permit evaluation process and providing  
more effective **mitigation** for authorized impacts to wetlands, the  
agencies encourage the establishment and appropriate use of **mitigation  
banks** in the Section 404 and ``Swampbuster'' programs.

DATES: The effective date of this Memorandum to the Field is December  
28, 1995.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Chowning (Corps) at (202)  
761-

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1781; Mr. Thomas Kelsch (EPA) at (202) 260-8795; Ms. Sandra Byrd (NRCS)  
at (202) 690-3501; Mr. Mark Miller (FWS) at (703) 358-2183; Ms. Susan-  
Marie Stedman (NMFS) at (301) 713-2325.

SUPPLEMENTARY INFORMATION: Mitigating the environmental impacts of  
necessary development actions on the Nation's wetlands and other  
aquatic resources is a central premise of Federal wetlands programs.  
The CWA Section 404 permit program relies on the use of compensatory  
**mitigation** to offset unavoidable damage to wetlands and other aquatic  
resources through, for example, the restoration or creation of

wetlands. Under the ``Swampbuster'' provisions of the FSA, farmers are required to provide **mitigation** to offset certain conversions of wetlands for agricultural purposes in order to maintain their program eligibility.

**Mitigation** banking has been defined as wetland restoration, creation, enhancement, and in exceptional circumstances, preservation undertaken expressly for the purpose of compensating for unavoidable wetland losses in advance of development actions, when such compensation cannot be achieved at the development site or would not be as environmentally beneficial. It typically involves the consolidation of small, fragmented wetland **mitigation** projects into one large contiguous site. Units of restored, created, enhanced or preserved wetlands are expressed as ``credits'' which may subsequently be withdrawn to offset ``debits'' incurred at a project development site.

Ideally, **mitigation banks** are constructed and functioning in advance of development impacts, and are seen as a way of reducing uncertainty in the CWA Section 404 permit program or the FSA ``Swampbuster'' program by having established compensatory **mitigation** credit available to an applicant. By consolidating compensation requirements, **banks** can more effectively replace lost wetland functions within a watershed, as well as provide economies of scale relating to the planning, implementation, monitoring and management of **mitigation** projects.

On August 23, 1993, the Clinton Administration released a comprehensive package of improvements to Federal wetlands programs which included support for the use of **mitigation banks**. At that same time, EPA and the Department of the Army issued interim guidance clarifying the role of **mitigation banks** in the Section 404 permit program and providing general guidelines for their establishment and use. In that document it was acknowledged that additional guidance would be developed, as necessary, following completion of the first phase of the Corps Institute for Water Resources national study on **mitigation** banking.

The Corps, EPA, NRCS, FWS and NMFS provided notice [60 FR 12286; March 6, 1995] of a proposed guidance on the policy of the Federal government regarding the establishment, use and operation of **mitigation banks**. The proposed guidance was based, in part, on the experiences to date with **mitigation** banking, as well as other environmental, economic and institutional issues identified through the Corps national study. Over 130 comments were received on the proposed guidance. The final guidance is based on full and thorough consideration of the public comments received.

A majority of the letters received supported the proposed guidance in general, but suggested modifications to one or more parts of the proposal. In response to these comments, several changes have been made to further clarify the provisions and make other modifications, as necessary, to ensure effective establishment and use of **mitigation banks**. One key issue on which the agencies received numerous comments focused on the timing of credit withdrawal. In order to provide additional clarification of the changes made to the final guidance in response to comments, the agencies wish to emphasize that it is our intent to ensure that decisions to allow credits to be withdrawn from a **mitigation** bank in advance of bank maturity be made on a case-by-case basis to best reflect the particular ecological and economic circumstances of each bank. The percentage of advance credits permitted for a particular bank may be higher or lower than the 15 percent example included in the proposed guidance. The final guidance is being revised to eliminate the reference to a specific percentage in order to provide needed flexibility. Copies of the comments and the agencies'

response to significant comments are available for public review. Interested parties should contact the agency representatives for additional information.

This guidance does not change the substantive requirements of the Section 404 permit program or the FSA ``Swampbuster'' program. Rather, it interprets and provides internal guidance and procedures to the agency field personnel for the establishment, use and operation of **mitigation banks** consistent with existing regulations and policies of each program. The policies set out in this document are not final agency action, but are intended solely as guidance. The guidance is not intended, not can it be relied upon, to create any rights enforceable by any party in litigation with the United States. The guidance does not establish or affect legal rights or obligations, establish a binding norm on any party and it is not finally determinative of the issues addressed. Any regulatory decisions made by the agencies in any particular matter addressed by this guidance will be made by applying the governing law and regulations to the relevant facts. The purpose of the document is to provide policy and technical guidance to encourage the effective use of **mitigation banks** as a means of compensating for the authorized loss of wetlands and other aquatic resources.

John H. Zirschky,

Acting Assistant Secretary (Civil Works), Department of the Army.

Robert Perciasepe,

Assistant Administrator for Water, Environmental Protection Agency.

James R. Lyons,

Assistant Secretary, Natural Resources and Environment, Department of Agriculture.

George T. Frampton, Jr.,

Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior.

Douglas K. Hall,

Assistant Secretary for Oceans and Atmosphere, Department of Commerce.

Memorandum to the Field

Subject: Federal Guidance for the Establishment, Use and Operation of **Mitigation Banks**

## I. Introduction

### A. Purpose and Scope of Guidance

This document provides policy guidance for the establishment, use and operation of **mitigation banks** for the purpose of providing compensatory **mitigation** for authorized adverse impacts to wetlands and other aquatic resources. This guidance is provided expressly to assist Federal personnel, bank sponsors, and others in meeting the requirements of Section 404 of the Clean Water Act (CWA), Section 10 of the Rivers and Harbors Act, the wetland conservation provisions of the Food Security Act (FS) (i.e., ``Swampbuster''), and other applicable Federal statutes and regulations. The policies and procedures discussed herein are consistent with current requirements of the Section 10/404 regulatory program and ``Swampbuster'' provisions and are intended only to clarify the applicability of existing requirements to **mitigation** banking.

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The policies and procedures discussed herein are applicable to the

establishment, use and operation of public **mitigation banks**, as well as privately-sponsored **mitigation banks**, including third party **banks** (e.g. entrepreneurial **banks**).

## B. Background

For purposes of this guidance, **mitigation banking** means the restoration, creation, enhancement and, in exceptional circumstances, preservation of wetlands and/or other aquatic resources expressly for the purpose of providing compensatory **mitigation** in advance of authorized impacts to similar resources.

The objective of a **mitigation bank** is to provide for the replacement of the chemical, physical and biological functions of wetlands and other aquatic resources which are lost as a result of authorized impacts. Using appropriate methods, the newly established functions are quantified as **mitigation** ``credits'' which are available for use by the bank sponsor or by other parties to compensate for adverse impacts (i.e., ``debits''). Consistent with **mitigation** policies established under the Council on Environmental Quality Implementing Regulations (CEQ regulations) (40 CFR Part 1508.20), and the Section 404(b)(1) Guidelines (Guidelines) (40 CFR Part 230), the use of credits may only be authorized for purposes of complying with Section 10/404 when adverse impacts are unavoidable. In addition, for both the Section 10/404 and ``Swampbuster'' programs, credits may only be authorized when on-site compensation is either not practicable or use of a **mitigation bank** is environmentally preferable to on-site compensation. Prospective bank sponsors should not construe or anticipate participation in the establishment of a **mitigation bank** as ultimate authorization for specific projects, as excepting such projects from any applicable requirements, or as preauthorizing the use of credits from that bank for any particular project.

**Mitigation banks** provide greater flexibility to applicants needing to comply with **mitigation** requirements and can have several advantages over individual **mitigation** projects, some of which are listed below:

1. It may be more advantageous for maintaining the integrity of the aquatic ecosystem to consolidate compensatory **mitigation** into a single large parcel or contiguous parcels when ecologically appropriate;

2. Establishment of a **mitigation bank** can bring together financial resources, planning and scientific expertise not practicable to many project-specific compensatory **mitigation** proposals. This consolidation of resources can increase the potential for the establishment and long-term management of successful **mitigation** that maximizes opportunities for contributing to biodiversity and/or watershed function;

3. Use of **mitigation banks** may reduce permit processing times and provide more cost-effective compensatory **mitigation** opportunities for projects that qualify;

4. Compensatory **mitigation** is typically implemented and functioning in advance of project impacts, thereby reducing temporal losses of aquatic functions and uncertainty over whether the **mitigation** will be successful in offsetting project impacts;

5. Consolidation of compensatory **mitigation** within a **mitigation bank** increases the efficiency of limited agency resources in the review and compliance monitoring of **mitigation** projects, and thus improves the reliability of efforts to restore, create or enhance wetlands for **mitigation** purposes.

6. The existence of **mitigation banks** can contribute towards attainment of the goal for no overall net loss of the Nation's wetlands by providing opportunities to compensate for authorized impacts when **mitigation** might not otherwise be appropriate or practicable.

## II. Policy Considerations

The following policy considerations provide general guidance for the establishment, use and operation of **mitigation banks**. It is the agencies' intent that this guidance be applied to **mitigation bank** proposals submitted for approval on or after the effective date of this guidance and to those in early stages of planning or development. It is not intended that this policy be retroactive for **mitigation banks** that have already received agency approval. While it is recognized that individual **mitigation** banking proposals may vary, it is the intent of this guidance that the fundamental precepts be applicable to future **mitigation banks**.

For the purposes of Section 10/104, and consistent with the CEQ regulations, the Guidelines, and the Memorandum of Agreement Between the Environmental Protection Agency (EPA) and the Department of the Army Concerning the Determination of **Mitigation** under the Clean Water Act Section 404(b)(1) Guidelines, **mitigation** means sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts. Compensatory **mitigation**, under Section 10/404, is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable adverse impacts. A site where wetlands and/or other aquatic resources are restored, created, enhanced, or in exceptional circumstances, preserved expressly for the purpose of providing compensatory **mitigation** in advance of authorized impacts to similar resources is a **mitigation bank**.

### A. Authorities

This guidance is established in accordance with the following statutes, regulations, and policies. It is intended to clarify provisions within these existing authorities and does to establish any new requirements.

1. Clean Water Act Section 404 (33 U.S.C. 1344).
2. Rivers and Harbors Act of 1899 Section 10 (33 U.S.C. 403 et seq.)
3. Environmental Protection Agency, Section 404(b)(1) Guidelines (40 CFR Part 230). Guidelines for Specification of Disposal Sites for Dredged or Fill Material.
4. Department of the Army, Section 404 Permit Regulations (33 CFR Parts 320-330). Policies for evaluating permit applications to discharge dredged or fill material.
5. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of **Mitigation** under the Clean Water Act Section 404(b)(1) Guidelines (February 6, 1990).
6. Title XII Food Security Act of 1985 as amended by the Food, Agriculture, Conservation and Trade Act of 1990 (16 U.S.C. 3801 et seq.).
7. National Environmental Policy Act (42 U.S.C. 4321 et seq.), including the Council on Environmental Quality's implementing regulations (40 CFR Parts 1500-1508).
8. Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.).
9. Fish and Wildlife Service **Mitigation** Policy (46 FR pages 7644-7663, 1981).
10. Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).
11. National Marine Fisheries Service Habitat Conservation Policy

(48 FR pages 53142-53147, 1983).

The policies set out in this document are not final agency action, but are intended solely as guidance. The guidance is not intended, nor can it be relied upon, to create any rights

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enforceable by any party in litigation with the United States. This guidance does not establish or affect legal rights or obligations, establish a binding norm on any party and it is not finally determinative of the issues addressed. Any regulatory decisions made by the agencies in any particular matter addressed by this guidance will be made by applying the governing law and regulations to the relevant facts.

## B. Planning Considerations

### 1. Goal Setting

The overall goal of a **mitigation** bank is to provide economically efficient and flexible **mitigation** opportunities, while fully compensating for wetland and other aquatic resource losses in a manner that contributes to the long-term ecological functioning of the watershed within which the bank is to be located. The goal will include the need to replace essential aquatic functions which are anticipated to be lost through authorized activities within the bank's service area. In some cases, **banks** may also be used to address other resource objectives that have been identified in a watershed management plan or other resource assessment. It is desirable to set the particular objectives for a **mitigation** bank (i.e., the type and character of wetlands and/or aquatic resources to be established) in advance of site selection. The goal and objectives should be driven by the anticipated **mitigation** need; the site selected should support achieving the goal and objectives.

### 2. Site Selection

The agencies will give careful consideration to the ecological suitability of a site for achieving the goal and objectives of a bank, i.e., that it possess the physical, chemical and biological characteristics to support establishment of the desired aquatic resources and functions. Size and location of the site relative to other ecological features, hydrologic sources (including the availability of water rights), and compatibility with adjacent land uses and watershed management plans are important factors for consideration. It also is important that ecologically significant aquatic or upland resources (e.g., shallow sub-tidal habitat, mature forests), cultural sites, or habitat for Federally or State-listed threatened and endangered species are not compromised in the process of establishing a bank. Other significant factors for consideration include, but are not limited to, development trends (i.e., anticipated land use changes), habitat status and trends, local or regional goals for the restoration or protection of particular habitat types or functions (e.g., re-establishment of habitat corridors or habitat for species of concern), water quality and floodplain management goals, and the relative potential for chemical contamination of the wetlands and/or other aquatic resources.

**Banks** may be sited on public or private lands. Cooperative arrangements between public and private entities to use public lands for **mitigation banks** may be acceptable. In some circumstances, it may be appropriate to site **banks** on Federal, state, tribal or locally-owned resource management areas (e.g., wildlife management areas, national or state forests, public parks, recreation areas). The siting of **banks** on

such lands may be acceptable if the internal policies of the public agency allow use of its land for such purposes, and the public agency grants approval. **Mitigation** credits generated by **banks** of this nature should be based solely on those values in the bank that are supplemental to the public program(s) already planned or in place, that is, baseline values represented by existing or already planned public programs, including preservation value, should not be counted toward bank credits.

Similarly, Federally-funded wetland conservation projects undertaken via separate authority and for other purposes, such as the Wetlands Reserve Program, Farmer's Home Administration fee title transfers or conservation easements, and Partners for Wildlife Program, cannot be used for the purpose of generating credits within a **mitigation** bank. However, **mitigation** credit may be given for activities undertaken in conjunction with, but supplemental to, such programs in order to maximize the overall ecological benefit of the conservation project.

### 3. Technical Feasibility

**Mitigation banks** should be planned and designed to be self-sustaining over time to the extent possible. The techniques for establishing wetlands and/or other aquatic resources must be carefully selected, since this science is constantly evolving. The restoration of historic or substantially-degraded wetlands and/or other aquatic resources (e.g., prior-converted cropland, farmed wetlands) utilizing proven techniques increases the likelihood of success and typically does not result in the loss of other valuable resources. Thus, restoration should be the first option considered when siting a bank. Because of the difficulty in establishing the correct hydrologic conditions associated with many creation projects and the tradeoff in wetland functions involved with certain enhancement activities, these methods should only be considered where there are adequate assurances to ensure success and that the project will result in an overall environmental benefit.

In general, **banks** which involve complex hydraulic engineering features and/or questionable water sources (e.g., pumped) are most costly to develop, operate and maintain, and have a higher risk of failure than **banks** designed to function with little or no human intervention. The former situations should only be considered where there are adequate assurances to ensure success. This guidance recognizes that in some circumstances wetlands must be actively managed to ensure their viability and sustainability. Furthermore, long-term maintenance requirements may be necessary and appropriate in some cases (e.g., to maintain fire-dependent plant communities in the absence of natural fire; to control invasive exotic plant species).

Proposed **mitigation** techniques should be well-understood and reliable. When uncertainties surrounding the technical feasibility of a proposed **mitigation** technique exist, appropriate arrangements (e.g., financial assurances, contingency plans, additional monitoring requirements) should be in place to increase the likelihood of success. Such arrangements may be phased-out or reduced once the attainment of prescribed performance standards is demonstrated.

### 4. Role of Preservation

Credit may be given when existing wetlands and/or other aquatic resources are preserved in conjunction with restoration, creation or enhancement activities, and when it is demonstrated that the preservation will augment the functions of the restored, created or enhanced aquatic resource. Such augmentation may be reflected in the total number of credits available from the bank.

In addition, the preservation of existing wetlands and/or other

aquatic resources in perpetuity may be authorized as the sole basis for generating credits in **mitigation banks** only in exceptional circumstances, consistent with existing regulations, policies and guidance. Under such circumstances, preservation may be accomplished through the implementation of appropriate legal mechanisms (e.g., transfer of deed, deed restrictions, conservation easement) to protect wetlands and/or other aquatic resources, accompanied by

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implementation of appropriate changes in land use or other physical changes as necessary (e.g., installation of restrictive fencing).

Determining whether preservation is appropriate as the sole basis for generating credits at a **mitigation** bank requires careful judgment regarding a number of factors. Consideration must be given to whether wetlands and/or other aquatic resources proposed for preservation (1) perform physical or biological functions, the preservation of which is important to the region in which the aquatic resources are located, and (2) are under demonstrable threat of loss or substantial degradation due to human activities that might not otherwise be expected to be restricted. The existence of a demonstrable threat will be based on clear evidence of destructive land use changes which are consistent with local and regional land use trends and are not the consequence of actions under the control of the bank sponsor. Wetlands and other aquatic resources restored under the Conservation Reserve Program or similar programs requiring only temporary conservation easements may be eligible for banking credit upon termination of the original easement if the wetlands are provided permanent protection and it would otherwise be expected that the resources would be converted upon termination of the easement. The number of **mitigation** credits available from a bank that is based solely on preservation should be based on the functions that would otherwise be lost or degraded if the aquatic resources were not preserved, and the timing of such loss or degradation. As such, compensation for aquatic resource impacts will typically require a greater number of acres from a preservation bank than from a bank which is based on restoration, creation or enhancement.

#### 5. Inclusion of Upland Areas

Credit may be given for the inclusion of upland areas occurring within a bank only to the degree that such features increase the overall ecological functioning of the bank. If such features are included as part of a bank, it is important that they receive the same protected status as the rest of the bank and be subject to the same operational procedures and requirements. The presence of upland areas may increase the per-unit value of the aquatic habitat in the bank. Alternatively, limited credit may be given to upland areas protected within the bank to reflect the functions inherently provided by such areas (e.g., nutrient and sediment filtration of stormwater runoff, wildlife habitat diversity) which directly enhance or maintain the integrity of the aquatic ecosystem and that might otherwise be subject to threat of loss or degradation. An appropriate functional assessment methodology should be used to determine the manner and extent to which such features augment the functions of restored, created or enhanced wetlands and/or other aquatic resources.

#### 6. **Mitigation** Banking and Watershed Planning

**Mitigation banks** should be planned and developed to address the specific resource needs of a particular watershed. Furthermore, decisions regarding the location, type of wetlands and/or other aquatic resources to be established, and proposed uses of a **mitigation** bank are most appropriately made within the context of a comprehensive watershed



plan. Such watershed planning efforts often identify categories of activities having minimal adverse effects on the aquatic ecosystem and that, therefore, could be authorized under a general permit. In order to reduce the potential cumulative effects of such activities, it may be appropriate to offset these types of impacts through the use of a **mitigation** bank established in conjunction with a watershed plan.

### C. Establishment of **Mitigation Banks**

#### 1. Prospectus

Prospective bank sponsors should first submit a prospectus to the Army Corps of Engineers (Corps) or Natural Resources Conservation Service (NRCS)\1\ to initiate the planning and review process by the appropriate agencies. Prior to submitting a prospectus, bank sponsors are encouraged to discuss their proposal with the appropriate agencies (e.g., pre-application coordination).

\1\ The Corps will typically serve as the lead agency for the establishment of **mitigation banks**. Bank sponsors proposing establishment of **mitigation banks** solely for the purpose of complying with the ``Swampbuster'' provisions of FSA should submit their prospectus to the NRCS.

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It is the intent of the agencies to provide practical comments to the bank sponsors regarding the general need for and technical feasibility of proposed **banks**. Therefore, bank sponsors are encouraged to include in the prospectus sufficient information concerning the objectives for the bank and how it will be established and operated to allow the agencies to provide such feedback. Formal agency involvement and review is initiated with submittal of a prospectus.

#### 2. **Mitigation** Banking Instruments

Information provided in the prospectus will serve as the basis for establishing the **mitigation** banking instrument. All **mitigation banks** need to have a banking instrument as documentation of agency concurrence on the objectives and administration of the bank. The banking instrument should describe in detail the physical and legal characteristics of the bank, and how the bank will be established and operated. For regional banking programs sponsored by a single entity (e.g., a state transportation agency), it may be appropriate to establish an ``umbrella'' instrument for the establishment and operation of multiple bank sites. In such circumstances, the need for supplemental site-specific information (e.g., individual site plans) should be addressed in the banking instrument. The banking instrument will be signed by the bank sponsor and the concurring regulatory and resource agencies represented on the **Mitigation** Bank Review Team (section II.C.2). The following information should be addressed, as appropriate, within the banking instrument:

- a. Bank goals and objectives;
- b. Ownership of bank lands;
- c. Bank size and classes of wetlands and/or other aquatic resources proposed for inclusion in the bank, including a site plan and specifications;
- d. Description of baseline conditions at the bank site;
- e. Geographic service area;
- f. Wetland classes or other aquatic resource impacts suitable for compensation;
- g. Methods for determining credits and debits;

- h. accounting procedures;
- i. Performance standards for determining credit availability and bank success;
- j. Reporting protocols and monitoring plan;
- k. Contingency and remedial actions and responsibilities;
- l. Financial assurances;
- m. Compensation ratios;
- n. Provisions for long-term management and maintenance.

The terms and conditions of the banking instrument may be amended, in accordance with the procedures used to establish the instrument and subject to agreement by the signatories.

In cases where initial establishment of the **mitigation** bank involves a discharge into waters of the United States requiring Section 10/404 authorization, the banking instrument will be made part of a Department of the Army permit for that discharge. Submittal of an

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individual permit application should be accompanied by a sufficiently-detailed prospectus to allow for concurrent processing of each. Preparation of a banking instrument, however, should not alter the normal permit evaluation process timeframes. A bank sponsor may proceed with activities for the construction of a bank subsequent to receiving the Department of the Army authorization. It should be noted, however, that a bank sponsor who proceeds in the absence of a banking instrument does so at his/her own risk.

In cases where the **mitigation** bank is established pursuant to the FSA, the banking instrument will be included in the plan developed or approved by NRCS and the Fish and Wildlife Service (FWS).

### 3. Agency Roles and Coordination

Collectively, the signatory agencies to the banking instrument will comprise the **Mitigation** Bank Review Team (MBRT). Representatives from the Corps, EPA, FWS, National Marine Fisheries Service (NMFS) and NRCS, as appropriate given the projected use for the bank, should typically comprise the MBRT. In addition, it is appropriate for representatives from state, tribal and local regulatory and resource agencies to participate where an agency has authorities and/or mandates directly affecting or affected by the establishment, use or operation of a bank. No agency is required to sign a banking instrument; however, in signing a banking instrument, an agency agrees to the terms of that instrument.

The Corps will serve as Chair of the MBRT, except in cases where the bank is proposed solely for the purpose of complying with the FSA, in which case NRCS will be the MBRT Chair. In addition, where a bank is proposed to satisfy the requirements of another Federal, state, tribal or local program, it may be appropriate for the administering agency to serve as co-Chair of the MBRT.

The primary role of the MBRT is to facilitate the establishment of **mitigation banks** through the development of **mitigation** banking instruments. Because of the different authorities and responsibilities of each agency represented on the MBRT, there is a benefit in achieving agreement on the banking instrument. For this reason, the MBRT will strive to obtain consensus on its actions. The Chair of the MBRT will have the responsibility for making final decisions regarding the terms and conditions of the banking instrument where consensus cannot otherwise be reached within a reasonable timeframe (e.g., 90 days from the date of submittal of a complete prospectus). The MBRT will review and seek consensus on the banking instrument and final plans for the restoration, creation, enhancement, and/or preservation of wetlands and other aquatic resources.

Consistent with its authorities under Section 10/404, the Corps is

responsible for authorizing use of a particular **mitigation** bank on a project-specific basis and determining the number and availability of credits required to compensate for proposed impacts in accordance with the terms of the banking instrument. Decisions rendered by the Corps must fully consider review agency comments submitted as part of the permit evaluation process. Similarly, the NRCS, in consultation with the FWS, will make the final decision pertaining to the withdrawal of credits from **banks** as appropriate **mitigation** pursuant to FSA.

#### 4. Role of the Bank Sponsor

The bank sponsor is responsible for the preparation of the banking instrument in consultation with the MBRT. The bank sponsor should, therefore, have sufficient opportunity to discuss the content of the banking instrument with the MBRT. The bank sponsor is also responsible for the overall operation and management of the bank in accordance with the terms of the banking instrument, including the preparation and distribution of monitoring reports and accounting statements/ledger, as necessary.

#### 5. Public Review and Comment

The public should be notified of and have an opportunity to comment on all bank proposals. For **banks** which require authorization under an individual Section 10/404 permit or a state, tribal or local program that involves a similar public notice and comment process, this condition will typically be satisfied through such standard procedures. For other proposals, the Corps or NRCS, upon receipt of a complete banking prospectus, should provide notification of the availability of the prospectus for a minimum 21-day public comment period. Notification procedures will be similar to those used by the Corps in the standard permit review process. Copies of all public comments received will be distributed to the other members of the MBRT and the bank sponsor for full consideration in the development of the final banking instrument.

#### 6. Dispute Resolution Procedure

The MBRT will work to reach consensus on its actions in accordance with this guidance. It is anticipated that all issues will be resolved by the MBRT in this manner.

##### a. Development of the Banking Instrument

During the development of the banking instrument, if any agency representative considers that a particular decision raises concern regarding the application of existing policy or procedures, an agency may request, through written notification, that the issue be reviewed by the Corps District Engineer, or NRCS State Conservationist, as appropriate. Said notification will describe the issue in sufficient detail and provide recommendations for resolution. Within 20 days, the District Engineer or State Conservationist (as appropriate) will consult with the notifying agency(ies) and will resolve the issue. The resolution will be forwarded to the other MBRT member agencies. The bank sponsor may also request the District Engineer or State Conservationist review actions taken to develop the banking instrument if the sponsor believes that inadequate progress has been made on the instrument by the MBRT.

##### b. Application of the Banking Instrument

As previously stated, the Corps and NRCS are responsible for making final decisions on a project-specific basis regarding the use of a **mitigation** bank for purposes of Section 10/404 and FSA, respectively. In the event an agency on the MBRT is concerned that a proposed use may be inconsistent with the terms of the banking instrument, that agency may raise the issue to the attention of the Corps or NRCS through the permit evaluation process. In order to facilitate timely and effective consideration of agency comments, the Corps or NRCS, as appropriate, will advise the MBRT agencies of a proposed use of a bank. The Corps

will fully consider comments provided by the review agencies regarding **mitigation** as part of the permit evaluation process. The NCRS will consult with FWA is making its decisions pertaining to **mitigation**.

If, in the view of an agency on the MBRT, an issued permit or series of permits reflects a pattern of concern regarding the application of the terms of the banking instrument, that agency may initiate review of the concern by the full MBRT through written notification to the MBRT Chair. The MBRT Chair will convene a meeting of the MBRT, or initiate another appropriate forum for communication, typically within 20 days of receipt of notification, to resolve concerns. Any such effort to address concerns

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regarding the application of a banking instrument will not delay any decision pending before the authorizing agency (e.g., Corps or NCRS).

#### D. Criteria for Use of a **Mitigation** Bank

##### 1. Project Applicability

All activities regulated under Section 10/404 may be eligible to use a **mitigation** bank as compensation for unavoidable impacts to wetlands and/or other aquatic resources. **Mitigation banks** established for FSA purposes may be debited only in accordance with the **mitigation** and replacement provisions of 7 CFR Part 12.

Credits from **mitigation banks** may also be used to compensate for environmental impacts authorized under other programs (e.g., state or local wetland regulatory programs, NPDES program, Corps civil works projects, Superfund removal and remedial actions). In no case may the same credits be used to compensate for more than one activity; however, the same credits may be used to compensate for an activity which requires authorization under more than one program.

##### 2. Relationship to **Mitigation** Requirements

Under the existing requirements of Section 10/404, all appropriate and practicable steps must be undertaken by the applicant to first avoid and then minimize adverse impacts to aquatic resources, prior to authorization to use a particular **mitigation** bank. Remaining unavoidable impacts must be compensated to the extent appropriate and practicable. For both the Section 10/404 and ``Swampbuster'' programs, requirements for compensatory **mitigation** may be satisfied through the use of **mitigation banks** when either on-site compensation is not practicable or use of the **mitigation** bank is environmentally preferable to on-site compensation.

It is important to emphasize that applicants should not expect that establishment of, or purchasing credits from, a **mitigation** bank will necessarily lead to a determination of compliance with applicable **mitigation** requirements (i.e., Section 404(b)(1) Guidelines or FSA Manual), or as excepting projects from any applicable requirements.

##### 3. Geographic Limits of Applicability

The service area of a **mitigation** bank is the area (e.g., watershed, county) wherein a bank can reasonably be expected to provide appropriate compensation for impacts to wetlands and/or other aquatic resources. This area should be designated in the banking instrument. Designation of the service area should be based on consideration of hydrologic and biotic criteria, and be stipulated in the banking instrument. Use of a **mitigation** bank to compensate for impacts beyond the designated service area may be authorized, on a case-by-case basis, where it is determined to be practicable and environmentally desirable.

The geographic extent of a service area should, to the extent environmentally desirable, be guided by the cataloging unit of the

``Hydrologic Unit map of the United States'' (USGS, 1980) and the ecoregion of the ``Ecoregions of the United States'' (James M. Omernik, EPA, 1986) or section of the ``Descriptions of the Ecoregions of the United States'' (Robert G. Bailey, USDA, 1980). It may be appropriate to use other classification systems developed at the state or regional level for the purpose of specifying bank service areas, when such systems compare favorably in their objectives and level of detail. In the interest of the integrating **banks** with other resource management objectives, bank service areas may encompass larger watershed areas if the designation of such areas is supported by local or regional management plans (e.g., Special Area Management Plans, Advance Identification), State Wetland Conservation Plans or other Federally sponsored or recognized resource management plans. Furthermore, designation of a more inclusive service area may be appropriate for **mitigation banks** whose primary purpose is to compensate for linear projects that typically involve numerous small impacts in several different watersheds.

#### 4. Use of a **Mitigation Bank** vs. On-Site **Mitigation**

The agencies' preference for on-site **mitigation**, indicated in the 1990 Memorandum of Agreement on **mitigation** between the EPA and the Department of the Army, should not preclude the use of a **mitigation bank** when there is no practicable opportunity for on-site compensation, or when use of a bank is environmentally preferable to on-site compensation. On-site **mitigation** may be preferable where there is a practicable opportunity to compensate for important local functions including local flood control functions, habitat for a species or population with a very limited geographic range or narrow environmental requirements, or where local water quality concerns dominate.

In choosing between on-site **mitigation** and use of a **mitigation bank**, careful consideration should be given to the likelihood for successfully establishing the desired habitat type, the compatibility of the **mitigation** project with adjacent land uses, and the practicability of long-term monitoring and maintenance to determine whether the effort will be ecologically sustainable, as well as the relative cost of **mitigation** alternatives. In general, use of a **mitigation bank** to compensate for minor aquatic resource impacts (e.g., numerous, small impacts associated with linear projects; impacts authorized under nationwide permits) is preferable to on-site **mitigation**. With respect to larger aquatic resource impacts, use of a bank may be appropriate if it is capable of replacing essential physical and/or biological functions of the aquatic resources which are expected to be lost or degraded. Finally, there may be circumstances warranting a combination of on-site and off-site **mitigation** to compensate for losses.

#### 5. In-kind vs. Out-of-kind **Mitigation** Determinations

In the interest of achieving functional replacement, in-kind compensation of aquatic resource impacts should generally be required. Out-of-kind compensation may be acceptable if it is determined to be practicable and environmentally preferable to in-kind compensation (e.g., of greater ecological value to a particular region). However, non-tidal wetlands should typically not be used to compensate for the loss or degradation of tidal wetlands. Decisions regarding out-of-kind **mitigation** are typically made on a case-by-case basis during the permit evaluation process. The banking instrument may identify circumstances in which it is environmentally desirable to allow out-of-kind compensation within the context of a particular **mitigation bank** (e.g., for **banks** restoring a complex of associated wetland types). **Mitigation banks** developed as part of an area-wide management plan to address a specific resource objective (e.g., restoration of a particularly

vulnerable or valuable wetland habitat type) may be such an example.

#### 6. Timing of Credit Withdrawal

The number of credits available for withdrawal (i.e., debiting) should generally be commensurate with the level of aquatic functions attained at a bank at the time of debiting. The level of function may be determined through the application of performance standards tailored to the specific restoration, creation or enhancement activity at the bank site or through the use of an appropriate functional assessment methodology.

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The success of a **mitigation** bank with regard to its capacity to establish a healthy and fully functional aquatic system relates directly to both the ecological and financial stability of the bank. Since financial considerations are particularly critical in early stages of bank development, it is generally appropriate, in cases where there is adequate financial assurance and where the likelihood of the success of the bank is high, to allow limited debiting of a percentage of the total credits projected for the bank at maturity. Such determinations should take into consideration the initial capital costs needed to establish the bank, and the likelihood of its success. However, it is the intent of this policy to ensure that those actions necessary for the long-term viability of a **mitigation** bank be accomplished prior to any debiting of the bank. In this regard, the following minimum requirements should be satisfied prior to debiting: (1) banking instrument and **mitigation** plans have been approved; (2) bank site has been secured; and (3) appropriate financial assurances have been established. In addition, initial physical and biological improvements should be completed no later than the first full growing season following initial debiting of a bank. The temporal loss of functions associated with the debiting of projected credits may justify the need for requiring higher compensation ratios in such cases. For **mitigation banks** which propose multiple-phased construction, similar conditions should be established for each phase.

Credits attributed to the preservation of existing aquatic resources may become available for debiting immediately upon implementation of appropriate legal protection accompanied by appropriate changes in land use or other physical changes, as necessary.

#### 7. Crediting/Debiting/Accounting Procedures

Credits and debits are the terms used to designate the units of trade (i.e., currency) in **mitigation** banking. Credits represent the accrual or attainment of aquatic functions at a bank; debits represent the loss of aquatic functions at an impact or project site. Credits are debited from a bank when they are used to offset aquatic resource impacts (e.g. for the purpose of satisfying Section 10/404 permit or FSA requirements).

An appropriate functional assessment methodology (e.g., Habitat Evaluation Procedures, hydrogeomorphic approach to wetlands functional assessment, other regional assessment methodology) acceptable to all signatories should be used to assess wetland and/or other aquatic resource restoration, creation and enhancement activities within a **mitigation** bank, and to quantify the amount of available credits. The range of functions to be assessed will depend upon the assessment methodology identified in the banking instrument. The same methodology should be used to assess both credits and debits. If an appropriate functional assessment methodology is impractical to employ, acreage may be used as a surrogate for measuring function. Regardless of the method

employed, the number of credits should reflect the difference between site conditions under the with-and without-bank scenarios.

The bank sponsor should be responsible for assessing the development of the bank and submitting appropriate documentation of such assessments to the authorizing agency(ies), who will distribute the documents to the other members of the MBRT for review. Members of the MBRT are encouraged to conduct regular (e.g., annual) on-site inspections, as appropriate, to monitor bank performance. Alternatively, functional assessments may be conducted by a team representing involved resources and regularly agencies and other appropriate parties. The number of available credits in a **mitigation** bank may need to be adjusted to reflect actual conditions.

The banking instrument should require that bank sponsors establish and maintain an accounting system (i.e., ledger) which documents the activity of all **mitigation** bank accounts. Each time an approved debit/credit transaction occurs at a given bank, the bank sponsor should submit a statement to the authorizing agency(ies). The bank sponsor should also generate an annual ledger report for all **mitigation** bank accounts to be submitted to the MBRT Chair for distribution to each member of the MBRT.

Credits may be sold to third parties. The cost of **mitigation** credits to a third party is determined by the bank sponsor.

#### Party Responsible for Bank Success

The bank sponsor is responsible for assuring the success of the debited restoration, creation, enhancement and preservation activities at the **mitigation** bank, and it is therefore extremely important that an enforceable mechanism be adopted establishing the responsibility of the bank sponsor to develop and operate the bank properly. Where authorization under Section 10/404 and/or FSA is necessary to establish the bank, the Department of the Army permit or NRCS plan should be conditioned to ensure that provisions of the banking instrument are enforceable by the appropriate agency(ies). In circumstances where establishment of a bank does not require such authorization, the details of the bank sponsor's responsibilities should be delineated by the relevant authorizing agency (e.g., the Corps in the case of Section 10/404 permits) in any permit in which the permittee's **mitigation** obligations are met through use of the bank. In addition, the bank sponsor should sign such permits for the limited purpose of meeting those **mitigation** responsibilities, thus confirming that those responsibilities are enforceable against the bank sponsor if necessary.

### E. Long-Term Management, Monitoring and Remediation

#### 1. Bank Operational Life

The operational life of a bank refers to the period during which the terms and conditions of the banking instrument are in effect. With the exception of arrangements for the long-term management and protection in perpetuity of the wetlands and/or other aquatic resources, the operational life of a **mitigation** bank terminates at the point when (1) Compensatory **mitigation** credits have been exhausted or banking activity is voluntarily terminated with written notice by the bank sponsor provided to the Corps or NRCS and other members of the MBRT, and (2) it has been determined that the debited bank is functionally mature and/or self-sustaining to the degree specified in the banking instrument.

#### 2. Long-term Management and Protection

The wetlands and/or other aquatic resources in a **mitigation** bank should be protected in perpetuity with appropriate real estate arrangements (e.g., conservation easements, transfer of title to

Federal or State resource agency or non-profit conservation organization). Such arrangements should effectively restrict harmful activities (i.e., incompatible uses \2\) that might otherwise jeopardize the purpose of the bank. In exceptional circumstances, real estate arrangements may be approved which dictate finite protection for a bank (e.g., for coastal protection projects which prolong the ecological viability of

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the aquatic system). However, in no case should finite protection extend for a lesser time than the duration of project impacts for which the bank is being used to provide compensation.

\2\ For example, certain silvicultural practices (e.g. clear cutting and/or harvests on short-term rotations) may be incompatible with the objectives of a **mitigation** bank. In contrast, silvicultural practices such as long-term rotations, selective cutting, maintenance of vegetation diversity, and undisturbed buffers are more likely to be considered a compatible use.

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The bank sponsor is responsible for securing adequate funds for the operation and maintenance of the bank during its operational life, as well as for the long-term management of the wetlands and/or other aquatic resources, as necessary. The banking instrument should identify the entity responsible for the ownership and long-term management of the wetlands and/or other aquatic resources. Where needed, the acquisition and protection of water rights should be secured by the bank sponsor and documented in the banking instrument.

### 3. Monitoring Requirements

The bank sponsor is responsible for monitoring the **mitigation** bank in accordance with monitoring provisions identified in the banking instrument to determine the level of success and identify problems requiring remedial action. Monitoring provisions should be set forth in the banking instrument and based on scientifically sound performance standards prescribed for the bank. Monitoring should be conducted at time intervals appropriate for the particular project type and until such time that the authorizing agency(ies), in consultation with the MBRT, are confident that success is being achieved (i.e., performance standards are attained). The period for monitoring will typically be five years; however, it may be necessary to extend this period for projects requiring more time to reach a stable condition (e.g., forested wetlands) or where remedial activities were undertaken. Annual monitoring reports should be submitted to the authorizing agency(ies), who is responsible for distribution to the other members of the MBRT, in accordance with the terms specified in the banking instrument.

### 4. Remedial Action

The banking instrument should stipulate the general procedures for identifying and implementing remedial measures at a bank, or any portion thereof. Remedial measures should be based on information contained in the monitoring reports (i.e., the attainment of prescribed performance standards), as well as agency site inspections. The need for remediation will be determined by the authorizing agency(ies) in consultation with the MBRT and bank sponsor.

### 5. Financial Assurances

The bank sponsor is responsible for securing sufficient funds or other financial assurances to cover contingency actions in the event of bank default or failure. Accordingly, **banks** posing a greater risk of



failure and where credits have been debited, should have comparatively higher financial sureties in place, than those where the likelihood of success is more certain. In addition, the bank sponsor is responsible for securing adequate funding to monitor and maintain the bank throughout its operational life, as well as beyond the operational life if not self-sustaining. Total funding requirements should reflect realistic cost estimates for monitoring, long-term maintenance, contingency and remedial actions.

Financial assurances may be in the form of performance bonds, irrevocable trusts, escrow accounts, casualty insurance, letters of credit, legislatively-enacted dedicated funds for government operate **banks** or other approved instruments. Such assurances may be phased-out or reduced, once it has been demonstrated that the bank is functionally mature and/or self-sustaining (in accordance with performance standards).

#### F. Other Considerations

##### 1. In-lieu-fee **Mitigation** Arrangements

For purposes of this guidance, in-lieu-fee, fee **mitigation**, or other similar arrangements, wherein funds are paid to a natural resource management entity for implementation of either specific or general wetland or other aquatic resource development projects, are not considered to meet the definition of **mitigation** banking because they do not typically provide compensatory **mitigation** in advance of project impacts. Moreover, such arrangements do not typically provide a clear timetable for the initiation of **mitigation** efforts. The Corps, in consultation with the other agencies, may find there are circumstances where such arrangements are appropriate so long as they meet the requirements that would otherwise apply to an offsite, prospective **mitigation** effort and provides adequate assurances of success and timely implementation. In such cases, a formal agreement between the sponsor and the agencies, similar to a banking instrument, is necessary to define the conditions under which its use is considered appropriate.

##### 2. Special Considerations for ``Swampbuster''

Current FSA legislation limits the extent to which **mitigation** banking can be used for FSA purposes. Therefore, if a **mitigation** bank is to be used for FSA purposes, it must meet the requirements of FSA.

#### III. Definitions

For the purposes of this guidance document the following terms are defined:

A. Authorizing agency. Any Federal, state, tribal or local agency that has authorized a particular use of a **mitigation** bank as compensation for an authorized activity; the authorizing agency will typically have the enforcement authority to ensure that the terms and conditions of the banking instrument are satisfied.

B. Bank sponsor. Any public or private entity responsible for establishing and, in most circumstances, operating a **mitigation** bank.

C. Compensatory **mitigation**. For purposes of Section 10/404, compensatory **mitigation** is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

D. Consensus. The term consensus, as defined herein, is a process by which a group synthesizes its concerns and ideas to form a common collaborative agreement acceptable to all members. While the primary

goal of consensus is to reach agreement on an issue by all parties, unanimity may not always be possible.

E. Creation. The establishment of a wetland or other aquatic resource where one did not formerly exist.

F. Credit. A unit of measure representing the accrual or attainment of aquatic functions at a **mitigation** bank; the measure of function is typically indexed to the number of wetland acres restored, created, enhanced or preserved.

G. Debit. A unit of measure representing the loss of aquatic functions at an impact or project site.

H. Enhancement. Activities conducted in existing wetlands or other aquatic resources which increase one or more aquatic functions.

I. **Mitigation**. For purposes of Section 10/404 and consistent with the Council on Environmental Quality regulations, the Section 404(b) (1) Guidelines and the Memorandum of Agreement Between

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the Environmental Protection Agency and the Department of the Army Concerning the Determination of **Mitigation** under the Clean Water Act Section 404(b) (1) Guidelines, **mitigation** means sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts.

J. **Mitigation** bank. A **mitigation** bank is a site where wetlands and/or other aquatic resources are restored, created, enhanced, or in exceptional circumstances, preserved expressly for the purpose of providing compensatory **mitigation** in advance of authorized impacts to similar resources. For purposes of Section 10/404, use of a **mitigation** bank may only be authorized when impacts are unavoidable.

K. **Mitigation** Bank Review Team (MBRT). An interagency group of Federal, state, tribal and/or local regulatory and resource agency representatives which are signatory to a banking instrument and oversee the establishment, use and operation of a **mitigation** bank.

L. Practicable. Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

M. Preservation. The protection of ecologically important wetlands or other aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection and/or enhancement of the aquatic ecosystem.

N. Restoration. Re-establishment of wetland and/or other aquatic resource characteristics and function(s) at a site where they have ceased to exist, or exist in a substantially degraded state.

O. Service area. The service area of a **mitigation** bank is the designated area (e.g., watershed, county) wherein a bank can reasonably be expected to provide appropriate compensation for impacts to wetlands and/or other aquatic resources.

## **APPENDIX C: INITIAL REVIEW CHECKLIST**

### **INFORMATION TO BE PROVIDED TO THE MITIGATION BANKING REVIEW TEAM**

This is a list of information to be provided by the applicant for the pre-application coordination phase of the joint state/federal Mitigation Bank Review Team (MBRT). The MBRT's initial review is to let the applicant know if the proposed site might be a good candidate for a mitigation bank. **This initial information must be furnished to the MBRT members at least 2 weeks before a scheduled meeting.**

- *Contact the Corps of Engineers, Mobile District, Mr. Michael Moxey (251-694-3771) regarding the meeting schedule and mailing addresses for the MBRT members.*

#### **Provide the following:**

##### ***STEP I – INITIAL REVIEW:***

1. Aerial photography of the project site (historic and current use). The local NRCS is often a good source for current and historical aerial photos.
2. Preliminary wetland data:
  - a. Show the property on NRCS (Natural Resources Conservation Service) soil map.
  - b. Show the property on a U.S.G.S. quad (U.S. Geologic Survey).
  - c. Show the site on a NWI (National Wetlands Inventory) map. Please see [www.nwi.fws.gov](http://www.nwi.fws.gov) for available maps.
  - d. If possible, show site on the 8-digit HUC map.

*Note: At this phase, you do not have to delineate the property using the 1987 Corps of Engineers Delineation Manual.*

3. Total acreage of the site (including any upland buffers and upland inclusions). Estimated wetland acreage.
4. Show any streams on the site. Give current condition and projected restoration/enhancement. Give types/linear feet of streams on site.
5. A discussion of the current ecological conditions: Existing vegetative community types and target native community types. Target species should be the historic vegetative community.
6. A discussion of current land use at the site and surrounding areas. Show on a map the land uses surrounding the project site. Discuss reasonable expected development for the site (if bank activities were not implemented) and the surrounding area.

7. Describe how the mitigation will be accomplished. Examples – see below:
- Hydrologic restoration via filling ditch network
  - Re-establishment of fire regime
  - Re-establishment of native vegetative communities via (name activity proposed)
  - Other
  - Types of mitigation proposed: Restoration, Enhancement, Creation and/or Preservation.

Percentage (or number of acres) of each type of work: Restoration, Enhancement, Creation, and/or Preservation.

8. Discuss the proposed ecological conditions under the with- and without-bank scenarios, and how the difference between these will be quantified. Relevant to this discussion are the presence of special biological resources (e.g. endangered species/critical habitat, special aquatic sites, etc.) and adjacent land uses.
9. Narrative overview of the project describing how the resulting increase in ecological value at the site will improve conditions in the regional watershed (or proposed mitigation service area).
10. Address if the bank may affect or be affected by a public project. If so, discuss the bank's compatibility with the public project.
11. A discussion of any known existing or potential historic or archaeological resources on or near the site. It is not necessary to conduct a Phase I historic resources survey at this time.
12. A discussion of any known existing (State or Federal level) Threatened or Endangered Species or their critical habitat on or near the site. It is not necessary to conduct an Endangered Species survey at this time.
13. A discussion of what interest in the property is currently held and will be maintained (e.g., fee simple ownership, lease or use agreement, easements: road, powerline or other types of easements, floodways, mineral rights, etc.); identify any portion of the bank that would occur on public lands; identify the owner of that land or holder of any easements on the property.
14. If known, the proposed Mitigation Service Area and rationale.

**STEP 2 - SITE VISIT:** After review of the information submitted in Step I., a site visit will be scheduled if the MBRT believes the proposed site has any mitigation banking potential.

SITE VISIT: The applicant is to furnish the following information for the site visit:

- A preliminary mitigation functional assessment should be performed by dividing the project site into polygons.
- Each polygon should represent an area of specific habitat within the site (Pine Flatwoods polygon, Bottomland Hardwood polygon, or Depressional polygon, etc.).
- A general mitigation strategy identifying restoration, enhancement, or preservation strategies (creation will be reviewed on a case-by-case basis but is generally not encouraged for mitigation banks) by polygon. The applicant may benefit from performing a functional assessment method such as HGM, WRAP, M-WRAP, or Ratio Method to determine credit generation by the different mitigation strategies. However, please verify type of proposed assessment with the MBRT.
- For each polygon, you must provide: 1) baseline evaluation, 2) “with bank,” and 3) “without bank” scenarios.
- The points at which the assessments are taken must be marked (flagging, GIS coordinates, etc.) so they can be revisited by the MBRT during the site inspection..
- The applicant must be able to justify all mitigation strategies, functional assessments, and credit generation findings to the MBRT.

***STEP 3 - INITIATE PROSPECTUS:*** After the site inspection, if the MBRT believes that the property has mitigation banking potential, the applicant will be requested to provide a prospectus. To expedite the approval process, the MBRT recommends the applicant also initiate efforts for providing the following required information:

- A wetland delineation to the Corps of Engineers for verification and begin work on the Banking Prospectus
- A cultural resource survey and written verification provided from the State Historic Preservation Officer that any activity within the mitigation bank area is in compliance with the National Historic Preservation Act of 1966 and will not threaten significant historical or archaeological data.
- A Threatened and Endangered Species survey which should be coordinated with the U.S. Fish and Wildlife Service.

## **APPENDIX D: PROSPECTUS CHECKLIST**

The Mitigation Bank Prospectus (Prospectus) is intended to be used at the pre-application coordination phase of the joint state/federal Mitigation Bank Review Team (MBRT) process to facilitate the exchange of information between prospective mitigation bankers and regulatory agency staff. The goal of the Prospectus is to maximize the effectiveness of the pre-application meeting for all attendees.

15. \_\_\_\_\_ Aerial photography of the project site (historic and current use).
16. \_\_\_\_\_ A preliminary wetland delineation (i.e. soil maps, NWI, U.S.G.S. quad, etc.)
17. \_\_\_\_\_ Narrative overview of the project describing how the resulting increase in ecological value at the site will improve conditions in the regional watershed (or proposed mitigation service area).
18. \_\_\_\_\_ Types of mitigation proposed: Restoration, Enhancement, Creation and/or Preservation.
19. \_\_\_\_\_ Estimated acreage of each type of work: Restoration, Enhancement, Creation, and/or Preservation.
20. \_\_\_\_\_ Describe how the mitigation will be accomplished. Examples – see below:
  - Hydrologic restoration via filling ditch network
  - Re-establishment of fire regime
  - Re-establishment of native vegetative communities via (name activity proposed)
  - Other
21. \_\_\_\_\_ Existing vegetative community types and target native community types.
22. \_\_\_\_\_ A discussion of the current ecological conditions, the proposed ecological conditions under the with- and without-bank scenarios (functional lift), and how the difference between these will be quantified. Relevant to this discussion are the presence of special biological resources (e.g. endangered species/critical habitat, special aquatic sites, etc.) and adjacent land uses.
23. \_\_\_\_\_ Address if the bank may affect or be affected by a public project. If so, discuss the bank's compatibility with the public project.
24. \_\_\_\_\_ A preliminary discussion of any existing or potential historic or archaeological resources on the site.

25. \_\_\_\_\_ A discussion of what interest in the property is currently held and will be maintained (e.g., fee simple ownership, lease or use agreement, easements: road, powerline or other types of easements, floodways, mineral rights, etc.); identify any portion of the bank that would occur on public lands; identify the owner of that land or holder of any easements on the property.
26. \_\_\_\_\_ The proposed Mitigation Service Area and rationale.
27. \_\_\_\_\_ Identify the anticipated customers.
28. \_\_\_\_\_ Anticipated schedule for completion of the bank.
29. \_\_\_\_\_ Plans for perpetual maintenance and management of the bank, identifying the responsible party.
30. \_\_\_\_\_ A discussion of current land use at the bank site and surrounding areas. Discuss reasonable expected development for the site (if bank activities were not implemented) and the surrounding area.
31. \_\_\_\_\_ An Endangered Species and/or Critical Habitat survey performed.
32. \_\_\_\_\_ Proof of Discussion with County and City as to incorporation of site within area, i.e., that there are no objections or conflicts.
33. \_\_\_\_\_ Criteria: Proposed Timetable as to release of credits. (MBRT to draft a page that gives normal credit release.)
34. \_\_\_\_\_ Specifics on Performance Bond (% of \_\_\_\_\_).
35. \_\_\_\_\_ Specifics on Long-term Stewardship Board and Funding.

## **APPENDIX G: SPECIAL MBRT FORUM POLICY CONSIDERATIONS FOR PROPOSED MITIGATION BANKS IN ALABAMA AND MISSISSIPPI**

**BACKGROUND:** To streamline the evaluation of mitigation bank proposals within the Mobile District regulatory boundaries, State and Federal permitting and resource protection agencies have agreed to work together through the joint State/Federal Mitigation Bank Review Team (MBRT) process. The joint process is designed to evaluate the technical aspects of mitigation banking through a team approach. Experience to date has shown that during the technical evaluation of certain mitigation banking proposals, policy issues have been raised that requires detailed coordination of policy level decision makers of the respective agencies. It is important these potential policy conflicts be identified and discussed at an early stage so that the permitting and natural resource agencies, as well as the applicants, have a full understanding of the implications of these mitigation banking proposals. To resolve these policy conflicts, a **MBRT Special Forum** is usually convened.

The **MBRT Special Forum** includes mid-level supervisors up to top-level executives. This Forum may convene a meeting of the appropriate agency representatives or coordinate via a conference call or other forms of communication.

**PURPOSE:** The purpose of this procedure is to provide a mechanism for the early identification of mitigation bank proposals that may require special handling in terms of agency policy interpretation and/or special interagency coordination. Projects that are identified through this procedure, as requiring policy interpretation and/or special study should not be reviewed for technical sufficiency until the identified issues are resolved. This will prevent not only the MBRT but also the applicant from expending valuable staff and fiscal resources on proposals that are unlikely to be authorized.

**EACH OF THE FOLLOWING POLICY ISSUES MUST BE CONSIDERED FOR EACH MITIGATION BANK PROPOSAL:**

- I. PRESERVATION IS THE SOLE BASIS FOR GENERATING CREDITS IN THE BANK**
- II. THE BANK IS WHOLLY OR PARTIALLY SITED ON PUBLIC LANDS.**
- III. THE BANK HAS A NEXUS TO A PUBLIC PROJECT.**
- IV. THE BANK SUPPLANTS A PUBLIC PROJECT PLANNED OR IN PLACE.**



**I. PRESERVATION IS THE SOLE BASIS FOR GENERATING CREDITS IN THE BANK**

- A. Preservation is not the sole basis for generating credits.....Go to II
- B. Federal Policy: In accordance with federal policy on compensatory mitigation for wetland impacts, the preservation of existing wetlands and/or other aquatic resources in perpetuity may be authorized as the sole basis for generating credits in mitigation banks only in exceptional circumstances.
- C. Determination: In determining whether preservation is appropriate as the sole basis for generating credits, careful judgment is required regarding a number of factors. **The following items must be addressed regarding the area proposed for preservation:**
- Do the wetlands and/or other aquatic resource perform physical, chemical, or biological functions, the preservation of which is important to the region?
  - Are these aquatic resources under demonstrable threat of loss\* or substantial degradation due to human activities\* that might not otherwise be expected to be restricted?
  - The existence of a demonstrable threat will be based on clear evidence of destructive land use changes that are consistent with local and regional land use trends and are not the consequence of actions under the control of the bank sponsor.

**II. THE BANK IS WHOLLY OR PARTIALLY SITED ON PUBLIC LANDS**

- A. The proposed bank is not wholly, or partially, sited on public lands.... Go to III.
- B. To aid the MBRT in determining whether the bank proposal is consistent with each agency's policy on mitigation on public land, the agencies are encouraged to develop guidance, either singly or jointly, on this issue.

**Policy consideration (II):**

- The **MBRT Special Forum** must determine if the mitigation bank proposal conforms to the joint or individual policies of the MBRT and/or agency that owns or manages the subject lands.

- Further study of input by experts may be necessary for the **MBRT Special Forum** to make its final determination.

C. Final Determination: Based on interagency coordination and the recommendations of respective staff and/or the specialized study team the **MBRT Special Forum** determines:

- The proposal is consistent with the agency's public land policies.....Go to III.
- The proposal is NOT consistent with the agency's public land policies and therefore is inappropriate.

### III. THE BANK HAS A NEXUS TO A PUBLIC PROJECT.

- A. The proposed bank does not have a nexus to a public project.....Go to IV.
- B. The siting of mitigation banks in locations which further the goals of ecosystems or watershed management plans is encouraged. Many times it will be advantageous from an ecosystem perspective to site a mitigation bank adjacent to existing conservation lands. It must be remembered however, that there may be operational issues associated with the public project that could be incompatible with those of a mitigation bank. In most of these cases, input will be needed from specialists involved with the public project to help the **MBRT Special Forum** determine if establishment of a mitigation bank in conjunction with the public project would be appropriate.

In cases where it is determined that a mitigation bank is compatible with the operational and long-term management goals of the public project, it must also be remembered that credit may only be given to the bank for activities undertaken in conjunction with, *but supplemental to*, such programs in order to maximize the overall ecological benefit of the project. Determining where the benefits of the public program end, so that accounting of the benefits of the mitigation bank can begin, can be difficult.

#### Policy consideration (III):

- The **MBRT Special Forum** must determine if the mitigation bank is operationally compatible, now and in the future with the public project.
- In most instances, further study or input by experts will be necessary for the **MBRT Special Forum** to make its **final** determination.

C. Final Determination: Based on interagency coordination and the recommendations of respective staff and/or the specialized study team the **MBRT Special Forum** determines:

- The proposal is compatible with the public project.....Go to IV.
- The proposal is NOT compatible with the public project and therefore is inappropriate.

**IV. THE BANK SUPPLANTS A PUBLIC PROJECT PLANNED OR IN PLACE.**

A. The proposed bank would not supplant a planned or in place public Project.....go to V.

B. The following narrative is a consideration only under Federal requirements for the evaluation of mitigation banks. Tightening fiscal resources are driving new and innovative approaches to accomplish much needed environmental restoration and conservation projects. Clearly, mitigation banking can play an important role. However, it must be recognized that the net effect to the environment will differ depending upon the method through which a given restoration or conservation project is accomplished. By definition, the ecological benefits of a mitigation bank are offset by the incremental losses for which the bank was established to mitigate; a zero-sum gains for the environment. On the other hand, if the same project was accomplished by a public agency for the express purpose of improving the environment in the long-term, the ecological benefits would accrue indefinitely; a true net gain. Therefore, whenever a mitigation bank supplants a public effort the result is a loss of that potential net improvement.

Restoration and preservation efforts at all levels of government must be considered in determining which public programs should not be supplanted by mitigation banks. This can be a controversial question requiring close interagency coordination.

**Policy Consideration (IV):**

- The **MBRT Special Forum** must determine if the mitigation bank proposal would supplant an environmental improvement or conservation project already planned or in place by a public agency.
  - Further study or input by experts may be necessary prior to the **MBRT Special Forum** determination.
- C. Final Determination: Based on interagency coordination and the recommendations of respective staff and/or the specialized study team the **MBRT Special Forum** determines:

- The proposed bank would supplant a pre-existing or planned public effort.....Go to V.
- The proposed bank would result in a net-loss to the environment and is therefore inappropriate.

**V. FURTHER REVIEW OF MITIGATION BANK PROPOSAL DETERMINED.**

- A. If the **MBRT Special Forum** determined that the mitigation bank proposal was inappropriate for one, or more, of the above policy considerations, the MBRT will not resume technical review of the project. The MBRT chair notifies that prospective banker that the **MBRT Special Forum** has determined that the proposed mitigation bank is inappropriate and would not likely be authorized.
- B. If the **MBRT Special Forum** did not identify any policy conflicts with the mitigation bank proposal, the MBRT continues with its technical review of the mitigation bank proposal utilizing guidance from the **MBRT Special Forum** and any findings of study teams formed during the **MBRT Special Forum** evaluation.